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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

LEVEL 3 COMMUNICATIONS, LLC, a Delaware limited liability company, Plaintiff, v.	CV. 01-1818-PA PLAINTIFF'S REPLY TO OPPOSITIONS OF THE COMMISSION AND QWEST TO LEVEL 3'S MOTION FOR SUMMARY JUDGMENT

LEVEL 3'S REPLY TO OPPOSITIONS TO MOTION FOR SUMMARY JUDGMENT

PUBLIC UTILITY COMMISSION OF OREGON; ROY HEMMINGWAY, Chairman, LEE BEYER, Commissioner, and JOAN H. SMITH, Commissioner, in their official capacities as Commissioners of the Public Utility Commission; and QWEST CORPORATION, a Colorado corporation, Defendants.	FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Level 3 Communications, LLC ("Level 3") hereby replies to the responses filed by the Public Utility Commission of Oregon and its individual Commissioners Hemmingway, Beyer, and Smith (collectively, the "Commission") and Qwest Corporation ("Qwest") in opposition to Level 3's motion for summary judgment. The court should reject the challenges of the Commission and Qwest and enter summary judgment in favor of Level 3.

To defend the Commission's decision on Issue 3 in the arbitration—finding that Level 3 must pay for trunks and facilities on the Qwest side of the point of interconnection ("POI") used for calls originated by Qwest's customers—the Commission and Qwest must demonstrate that Level 3's Internet service provider ("ISP")-bound traffic is outside the scope of "telecommunications traffic" as defined in the Rule 51.701(b)(1) of the Federal Communications Commission ("FCC"). The FCC's rules prohibit a local exchange carrier ("LEC") from charging other telecommunications carriers for origination of any telecommunications traffic on the LEC's network. In its *ISP Order on Remand*, the FCC revised its "telecommunications traffic" definition to eliminate any limitation to "local" traffic and to exclude from that definition interstate or intrastate exchange access, information access, or exchange services used to provide such access, which is subject to § 251 of the Communications Act of 1934, as amended ("Act"). Although the FCC, is its *ISP Order on Remand*, concluded that ISP-bound traffic exchanged between LECs was "information access," the D.C. Circuit reversed and remanded the FCC's conclusion that ISP-bound traffic was information access.

The arguments offered by the Commission and Qwest in their responses fail to remedy

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the Commission's legal errors in excluding ISP-bound traffic from the scope of "telecommunications traffic." Contrary to the claims of the Commission and Qwest, FCC Rule 51.703(b)'s plain language applies to prohibit Qwest from charging Level 3 for traffic originating on Qwest's network—including payments from Level 3 to Qwest for trunks and facilities on the Qwest side of the POI. And contrary to Qwest's arguments, the Commission's decision cannot be justified on the alternative grounds of FCC Rule 51.709(b), which applies on its face to terminating compensation only, but if otherwise applied, would also trigger the application of FCC Rule 51.703(b). Neither of these proffered justifications can cure the legal errors in the Commission's decision. Level 3 is therefore entitled to judgment as a matter of law.

ARGUMENT

I. THE COMMISSION ERRED IN FAILING TO APPLY FCC RULE 51.703(b)

The Commission erred in failing to apply FCC Rule 51.703(b) to find that charging Level 3 for trunks and facilities on the Qwest side of the POI used for calls originated by Qwest's customers would violate the FCC's prohibition on a LEC from charging another telecommunications carrier for traffic originating on the LEC's network. The Commission and Qwest argue—in some cases for very different, but equally mistaken, reasons—that FCC Rule 51.703(b) does not apply to ISP-bound traffic.

A. FCC Rule 51.703(b) Applies to All "Telecommunications Traffic," Not Just to Requests for Reciprocal Compensation Pursuant to § 251(b)(5)

FCC Rule 51.703(b) applies to all "telecommunications traffic," not just to requests for intercarrier compensation pursuant to § 251(b)(5). The Commission's arguments to the contrary are erroneous as a matter of law.

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First, the Commission mistakenly argues that because the interconnection dispute between Level 3 and Qwest is somehow "not a § 251(b)(5) matter," FCC Rule 51.703(b) does not apply. The Commission claims repeatedly and mistakenly that because the FCC promulgated FCC Rule 51.703(b) pursuant to § 251(b)(5)—rather than § 251(c)(2)—it cannot apply to this interconnection dispute. *See* Commission Response at 3, 4, 5, 7, 9. The Commission tries to argue that FCC Rule 51.703(b) is limited in scope based on where the FCC discussed it in the *Local Competition Order* and where it is codified.[1] But the Commission's strained reading does not square with the language of FCC Rule 51.703(b), which states that "[a] LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network."[2] FCC Rule 51.703(b), by its terms and plain language, is not limited to situations involving requests for terminating reciprocal compensation pursuant to § 251(b)(5).

Second, the Commission tries to read FCC Rule 51.703(b) in isolation from FCC Rule 51.703(a). In those two rules, the FCC specified what a LEC's reciprocal compensation obligation is, and what it is not. In FCC Rule 51.703(a), the FCC specified what it is: "Each LEC shall establish reciprocal compensation arrangements for transport and termination of

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1 *See* Commission Response at 4; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd. 15,499, 16,008-21 ¶¶ 1027-48 (1996) ("*Local Competition Order*"), *aff'd in part and vacated in part sub nom Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom. Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999); 47 C.F.R. Part 51, Subpart H.

2 47 C.F.R. § 51.703(b).

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telecommunications traffic with any requesting telecommunications carrier."[3] But the FCC recognized that if in some cases, LECs were also charging interconnecting carriers for origination. The FCC therefore adopted FCC Rule 51.703(b) to make absolutely clear that LECs may not charge for origination.[4]

B. FCC Rule 51.703(b) Applies to All "Telecommunications Traffic," Including ISP-Bound Traffic

Qwest, by contrast, agrees with Level 3 that § 251(b)(5) and FCC Rule 51.703(b) apply to all telecommunications traffic, but argues mistakenly that FCC Rule 51.703 excludes ISP-bound traffic because it is not "telecommunications traffic" as defined in FCC Rule 51.701(b)(1). *See, e.g.*, Qwest Response at 15. That rule defines "telecommunications traffic" as:

> Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (see [*ISP Order on Remand*] paragraphs 34, 36, 39, 42-43).[5]

Qwest argues that because "interstate or intrastate access [sic]" is excluded from the definition of "telecommunications traffic," ISP-bound traffic—which the FCC found to be, at least in part, jurisdictionally interstate—must be excluded from the definition of "telecommunications traffic." Qwest Response at 14. Qwest's argument is a definitional non-sequitur. The FCC did not carve out all interstate traffic from the definition of "telecommunications traffic," but only "interstate . . . exchange access."

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[3] 47 C.F.R. § 51.703(a). Level 3 would provide the transport and termination of that traffic to its ISP customers, whereas Qwest would originate such traffic on its network. *See* 47 C.F.R. § 51.701(c), (d).

[4] *See Local Competition Order*, 11 FCC Rcd. at 15,862 ¶ 717.

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Qwest nowhere makes a showing that ISP-bound traffic is actually "interstate . . . *exchange* access." Nor could it do so. "Exchange access" is a statutorily-defined term, referring to the "offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[6] "Telephone toll services"—itself a statutorily-defined term—means "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."[7] Because Level 3's service is not a service for which such a separate charge is made—and therefore not a "telephone toll service"—the origination of an ISP-bound call to a Level 3 ISP customer cannot be "for the purpose of the origination . . . of telephone toll services." Neither the Commission below, nor the FCC in its *ISP Order on Remand*, nor the D.C. Circuit in *WorldCom* ever found ISP-bound traffic to be "interstate exchange access."[8] Moreover, the FCC has exempted ISPs from the payment of certain interstate access charges, and treated ISPs as end-users for the purpose of applying access charges, entitling them to purchase local business services for their connections to LEC central offices and the public switched telephone network.[9]

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5 47 C.F.R. § 51.701(b)(1).

6 47 U.S.C. § 153(16).

7 47 U.S.C. § 153(48).

8 Commission Arbitration Decision, at 3-5; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*, 16 FCC Rcd. 9151, 9163-64 ¶¶ 25-26 (2001) ("*ISP Order on Remand*"); *WorldCom, Inc. v. FCC*, 288 F.3d 429, 431 (D.C. Cir. 2002).

9 *In re MTS and WATS Market Structure, Memorandum Opinion and Order*, 97 FCC 2d 682, 711 ¶ 78 (1983); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order*, 3 FCC Rcd. 2631, 2633 ¶ 17 (1988).

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Finally, the FCC's *TSR Wireless* decision continues to govern. The Commission and Qwest improperly dismiss *TSR Wireless* as a "paging" case when in fact the FCC interpreted the unrevised FCC Rule 51.703(b) in general terms to hold that a LEC may not charge for origination, even for a one-way service.[10] And both ignore the changes to FCC Rule 51.703(b) following the original remand in *Bell Atlantic Telephone Cos. v. FCC*, namely that the word "local" was deleted from the phrase "local telecommunications traffic."[11] Thus, the FCC in its *ISP Order on Remand* extended FCC Rule 51.703(b) to *all* "telecommunications traffic," regardless of its local, interstate, or jurisdictionally mixed nature. *TSR Wireless* now applies to a one-way, jurisdictionally mixed service such as ISP-bound traffic, and the Commission erred in failing to apply it.

C. The *ISP Order on Remand* Does Not Remove ISP-Bound Traffic from Its Prohibition on an Originating LEC from Imposing Origination Charges for Carrying Telecommunications Traffic to the POI

Although the FCC's *ISP Order on Remand* asserted jurisdiction over the setting of intercarrier compensation rates for the termination of ISP-bound traffic, it does not limit the applicability of the FCC's prohibition on an originating LEC from imposing origination charges for carrying ISP-bound traffic to the POI. The Commission and Qwest are therefore mistaken in arguing that § 251(b)(5) and FCC Rule 51.703(b) exclude ISP-bound traffic.

The Commission mistakenly argues that the *FCC's ISP Order on Remand* took ISP-bound traffic out of the reciprocal compensation regime of § 251(b)(5) altogether. Commission

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[10] *TSR Wireless LLC v. U S West Communications, Inc., Memorandum Opinion and Order*, 15 FCC Rcd. 11,166, 11,177-78 ¶ 21 (2000).

[11] 206 F.3d 1, 6 (D.C. Cir. 2000); *ISP Order on Remand*, 16 FCC Rcd. at 9165 ¶ 30 n.56, 9166 ¶ 32; Commission Response at 3; Qwest Response at 4.

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Response at 10. To the contrary, the FCC reiterated that ISP-bound traffic was subject to § 251(b)(5) by establishing what interim rate would govern reciprocal compensation for such traffic.[12] But in doing so, the FCC preempted the state commissions, stating that it—and not the state commissions—had the authority to determine the reciprocal compensation rates for ISP-bound traffic, although noting that the state commissions would retain the authority to apply and enforce those interim rates.[13] The FCC never suggested that ISP-bound traffic fell outside of the requirements of § 251(b)(5) altogether.

The Commission (somewhat inconsistently, in light of the preceding argument) and Qwest also mistakenly argue that the largely but not exclusively interstate nature of ISP-bound traffic altered LEC interconnection obligations with respect to ISP-bound traffic. *See* Commission Response at 10; Qwest Response at 14. To the contrary, the FCC and the courts have noted that ISP-bound traffic is of a jurisdictionally mixed nature, including both intrastate and interstate components.[14] And the FCC stated explicitly in footnote 149 of its *ISP Order on Remand* that it was addressing only the issue of setting intercarrier compensation rates for ISP-bound traffic—and leaving other interconnection obligations relating to ISP-bound traffic wholly unaltered.[15] The Commission and Qwest are left to argue unconvincingly that the *ISP Order on*

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[12] *ISP Order on Remand*, 16 FCC Rcd. at 9193-94 ¶ 89.

[13] *Id.* at 9189 ¶ 82.

[14] *See Bell Atlantic*, 206 F.3d at 5 (noting that "[c]alls to ISPs are not quite local, because there is some communication taking place between the ISP and out-of-state websites. But they are not quite long-distance, because the subsequent communication is not really a continuation, in the conventional sense, of the initial call to the ISP.").

[15] *ISP Order on Remand*, 16 FCC Rcd. at 9189 ¶ 78 n.149 (stating that the *ISP Order on Remand* "affects only the intercarrier *compensation* (*i.e.*, the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under our Part

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Remand's underlying "policies" support their arguments, as the text and the D.C. Circuit's interpretation thereof clearly do not. *See* Commission Response at 9-12; Qwest Response at 15, 17. Thus, the FCC rules specifying Qwest's interconnection obligations and the obligation to carry traffic to the POI without charging for origination remain intact, entitling Level 3 to judgment as a matter of law.

II. THE COMMISSION'S DECISION BELOW CANNOT BE JUSTIFIED IN THE ALTERNATIVE UNDER FCC RULE 51.709(b)

The Commission's decision below cannot be justified on FCC Rule 51.709(b), which Qwest argues to require that the costs of originating trunks and facilities on Qwest's side of the POI be allocated according to "relative use," and to exclude ISP traffic be excluded from such relative use calculations. *See* Qwest Response at 7, 12, 13, 14. On its face, FCC Rule 51.709(b) applies only to terminating compensation, which was not at issue in the interconnection dispute between Level 3 and Qwest.[16]

If accepted, however, Qwest's argument about applicability of FCC Rule 51.709(b) would demonstrate that Level 3's ISP-bound traffic should be included in the relative use calculation—exactly the result Qwest seeks to avoid. To invoke FCC Rule 51.709(b) as Qwest does, Level 3's ISP-bound traffic would necessarily constitute "traffic" for purposes of FCC

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51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection.").

[16] *See* 47 C.F.R. § 51.709(b) (stating that "[t]he rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network"). In this case, the "carrier providing transmission facilities" is Qwest, and the "interconnecting carrier" is Level 3.

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Rule 51.709(b) and therefore be subject to the "relative use" calculation of that provision. Moreover, by interpreting FCC Rule 51.709(b)'s reference to "traffic" as "telecommunications traffic," Qwest would also subject Level 3's ISP-bound traffic to FCC Rule 51.703(b), which also uses the term "telecommunications traffic," and thereby prohibit Qwest from charging Level 3 for traffic originating on Qwest's network. Neither of these results would support the Commission's exclusion of ISP-bound traffic from the "relative use" calculation for originating trunks and facilities on Qwest's side of the POI.

To limit these damaging results of its invocation of FCC Rule 51.709(b), Qwest invents its own limitations for the scope of traffic covered by FCC Rule 51.709(b). First, Qwest inserted the word "telecommunications" before "traffic," despite the plain language of the rule. Qwest Response at 4, 7. Second, as noted in part I.B above, Qwest incorrectly construes "telecommunications traffic" to exclude interstate services other than "exchange access, information access or exchange services for such access."[17] Neither of these limitations has any basis in the FCC's rules or the relevant court decisions. This Court should therefore reject Qwest's alternative FCC Rule 51.709(b) justification for the Commission's erroneous decision in the proceeding below, and grant Level 3's motion for summary judgment.

[17] 47 C.F.R. 51.701(b)(1).

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CONCLUSION

For reasons stated above and in Level 3's Memorandum of Law in Support of Motion for Summary Judgment, this Court should grant Level 3's motion for summary judgment.

DATED this 18th day of October, 2002.

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